IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
January 10, 2006 Session

JOHN McELROY v. PAMELA CARTER

Appeal from the Circuit Court for Sumner County
No. 25751-C C. L. Rogers, Judge

No. M2005-00414-COA-R3-CV - Filed on September 29, 2006

A man shot and wounded a cat owned by his neighbor as the animal exited from the bed of the man's prized pickup truck. The cat died from its wounds shortly thereafter. The neighbor sued for the veterinary bills she incurred for treatment of the cat's injuries. The truck owner counter-sued for the damage the cat allegedly caused to his truck by scratching the paint. After a bench trial, the court awarded the truck's owner $6,500 in damages, which it offset by a $372 award to the neighbor for her veterinary bills. We reverse the award to the truck's owner, since as a matter of law the cat's owner cannot be held liable for not keeping her cat confined when the damage the cat allegedly caused was not foreseeable. Additionally, we find the evidence preponderates against a finding that the cat caused the damages complained of.

Tenn. R. App. P.3 Appeal as of Right; Judgment of the Circuit Court Reversed

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and WILLIAM B. CAIN, J., joined.

James A. Simmons, Nashville, Tennessee, for the appellant, Pamela Carter.

C. Tracey Parks, Gallatin, Tennessee, for the appellee, John McElroy.

OPINION

I. FACTS

John McElroy and Pamela Carter live on adjoining tracts of land in a rural area outside Cottontown in Sumner County. Mr. McElroy has a longtime interest in automobiles. He has long experience building and customizing "street rods." One of his prized possessions is a customized 1950 GMC pickup truck, which he keeps in a lean-to structure attached to a barn on his property. A fitted car cover strapped over the vehicle is used to protect it from the elements.

Pamela Carter's passion is animals. She and her husband are members of the Humane Society. They rescue domestic cats that need a home, have them neutered or spayed, and furnish veterinary care for them. At the time of the events that gave rise to this case, the Carters were taking care of seven cats. Four of those animals were "indoor cats." Because of medical problems or because they had been declawed by previous owners, those four cats were not allowed out of the house. There was no such limitation on her other three cats, one of whom was a male between three and four years of age named Chester.

On the afternoon of February 2, 2004, Mr. McElroy saw Chester emerging from beneath the car cover on his truck. He had previously observed hair or fur on the carpet in the bed of the truck, and he believed animals had been living there. Mr. McElroy took out his .22 pistol and shot Chester. Ms. Carter and her husband were standing on their back porch when they heard the gunshot. They then saw Chester running toward them. They thought he had just been scared by the noise, and they opened the door to let him in. Later, they realized he had been shot. They brought him to a veterinarian, who treated him and performed surgery. Chester was released to the Carters, in whose home he died three days later.

II. COURT PROCEEDINGS

Pamela Carter began legal proceedings in this case by filing a civil warrant in the General Sessions Court of Sumner County, asking to be compensated for the $375 in veterinary bills she had incurred caring for Chester.[1] Mr. McElroy subsequently filed his own warrant, asking for $6,500 in "damages to 1950 Street Rod caused by defendants cats." The court tried both claims, dismissed Ms. Carter's warrant with prejudice, and granted Mr. McElroy a judgment on his claim in the amount of $3,250. After Ms. Carter appealed to the Sumner County Circuit Court, the two claims were consolidated for trial.

The trial of the matter was conducted in Circuit Court on January 4, 2005. Ms. Carter testified that she was not the only person in her neighborhood who had cats, claiming that one nearby neighbor had about thirteen feral cats, while another neighbor had several cats at one time. She also noted that other animals in the area included squirrels, raccoons, woodchucks and coyotes.

Ms. Carter admitted that she left bowls of cat food on her porch for her own "outdoor cats," and that other animals sometimes helped themselves from those bowls. Ms. Carter also stated that she knew Mr. McElroy and that they had spoken on the phone several times, but she testified that he had never told her that her cats were causing damage or that he wanted them off his property. She stated that she had owned forty or fifty cats during the course of her life, that she was familiar with their inclination to scratch wood and furniture, but that she had never known one to scratch metal.

[1] At that point, Ms. Carter did not know who had shot Chester and she initially named another neighbor as defendant. Mr. McElroy later stipulated that he was the shooter, and the warrant was amended by agreement to substitute him as defendant.

When he took the stand, Mr. McElroy denied that he had observed any stray cats on his property other than those owned by Ms. Carter. He admitted that he shot Chester, leading to the following exchange:

Q. Tell the Court what prompted that to occur?

A. A long stream of cat intrusions on my property over time. I wasn't aware of the damage to my truck until I went down there to check it.

Q. When are we talking about?

A. Last year.

Q. Prior to February 2 when the cat was shot?

A. Yes. It's been going on for a while, yes.

Mr. McElroy submitted photographs of his truck into evidence. They showed scratches on the left front fender and in the wooden bed of the pickup, and paw prints along a door. Mr. McElroy admitted under questioning that he did not remember exactly when he discovered the damage to his truck, and that if Chester could get underneath the cover, other animals could do so as well. He was asked if he had ever observed Chester doing any damage to the truck. He answered in the affirmative: "He scratched the paint coming out of the truck. He came from under the car cover that I had. When he came out, I shot him."

Mr. McElroy called Hale Lee as his expert witness to testify as to the cost of restoring the paint job on his truck to its pre-scratch condition. Mr. Lee customizes and paints street rods as part of the automotive restoration business he operates in Alabama. He testified that he had thirty to forty years experience painting street rods. Mr. Lee acknowledged under questioning that he and Mr. McElroy had been friends for over forty years and that he had spent the previous night at Mr. McElroy's house.

Mr. Lee testified that the paint job on Mr. McElroy's truck included a special blue pearl finish. According to Mr. Lee, scratches to such a finish cannot be removed by touching up the paint because it is impossible to achieve a perfect match to the original finish. The only acceptable solution is to sand the entire finish on the truck down to the primer, and apply a new paint job. Mr. Lee introduced an estimate he had prepared for such a restoration which set a price tag of $6,500 for the complete job.

At the conclusion of the proof, the trial court announced that Ms. Carter was entitled to prevail on her claim for veterinary expenses, finding that although you can use reasonable force to protect your property, it was not reasonable for Mr. McElroy to shoot Chester. The court also found

that Mr. McElroy was entitled to prevail on his property damage claim because Ms. Carter admitted that she allowed her cats to run at large and the damage to the truck did occur.

The court stated that "there was some attempt to show that it might have been another cat, but by a preponderance of the evidence, Chester was coming out of the truck right before he got shot and that's about the best we can do with that." Since Mr. Lee's testimony was the only proof as to the extent of the damage, the court entered a judgment in Mr. McElroy's favor in the amount of $6,500.

Mr. McElroy has not appealed the judgment against him. Ms. Carter appeals the judgment against her and challenges the finding that Chester was responsible for the damage and also challenges the amount of the award. There exists, however, another issue that is a fundamental requirement for any liability. We begin with that.

III. DUTY OF CARE

The parties did not brief the basic issues of duty of care and breach. This court, however, had serious questions, and asked those questions at oral argument,[2] about whether a cat owner has a duty to keep his or her pets confined so as to prevent their going on to the property of others. Duty of care and breach of that duty are, of course, basic elements of any negligence claim. *Draper v. Westerfield*, 181 S.W.3d 283 (Tenn. 2005); *Biscan v. Brown*, 160 S.W.3d 462, 478 (Tenn. 2005).

There are statutes that establish a duty to keep animals from roaming at large. *See, e.g.*, Tenn. Code Ann. § 44-8-109 (requiring that owners of "notoriously mischievous stock, known to be in the habit of throwing down or jumping fences" keep such livestock confined on their premises or suffer liability for damage to enclosure or crops of another); Tenn Code Ann. § 44-8-401 (making it unlawful for owners of livestock to willfully allow the same to run at large); Tenn Code Ann. § 44-8-403 (providing that no person shall suffer any stallion or jackass over fifteen months old to run at large); and Tenn Code Ann. § 44-8-408 (making it generally unlawful for a person owning or having control of a dog to allow the dog "to go upon the premises of another, or upon a highway, or upon a public street"). The clear purpose of such statutes is to protect persons and property from injury by the specified animals. *Alex v. Armstrong*, 385 S.W.2d 110, 114 (Tenn. 1964).

If such a statute existed that applied to cats, that statute might be found to provide the standard of care for this negligence action. In that situation, violation of the statute establishes negligence *per se*. Under the doctrine of negligence *per se*, the specific conduct required by a penal statute replaces the "reasonable person under similar circumstances" standard of care generally applicable in negligence cases.[3] *Cook v. Spinnaker's of Rivergate, Inc.*, 878 S.W.2d 934,937 (Tenn.

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[2]Neither party filed a supplemental brief addressing those questions or the issue of standard of care.

[3]Where, however, the statute prohibits the owner from "allowing" or "permitting" the animal to run at large, a plaintiff may still be required to show that the owner was negligent in containing the animal. *See Alex v. Armstrong*, (continued...)

1994); *King v. Danek Med., Inc*. 37 S.W.3d 429, 460 (Tenn. Ct. App. 2000). Conduct that violates a penal statute may be rendered negligent as a matter of law. *See* RESTATEMENT (SECOND) OF TORTS § 874A cmt. e ("The common law tort of negligence is not changed, but the expression of the standard of care in certain fact situations is modified; it is changed from a general standard to a specific rule of conduct.")

However, we have been unable to locate any similar statute applicable to cats.[4] Consequently, any duty to prevent a cat from going onto another's property must be found in the common law. It has been stated that, as a general rule, where an owner of animals negligently allows them to run at large, he or she is liable for damages caused by that negligence. *Moon v. Johnson*, 47 Tenn. App. 208, 337 S.W.2d 464 (1959). However, this rule has generally been applied in the context of livestock. *See, e.g., Stinson v. Carpenter*, No. 01A019601-CV00036, 1997 WL 24877 (Tenn. Ct. App. Jan.24, 1997).

For example, the Restatement establishes the rule of strict liability of possessors of livestock that enter upon land of another for damage caused by that trespass. RESTATEMENT (SECOND) OF TORTS § 504. However, the commentary explains that the word livestock denotes those types of domestic animals normally susceptible of confinement without impairing their utility. "[I]t does not include . . . cats, which are difficult to restrain and unlikely to do any substantial harm by their intrusion." RESTATEMENT (SECOND) OF TORTS § 504 cmt. *b*.[5]

In the absence of an applicable statute, courts have generally held that an owner of domestic pets such as cats is not strictly liable for damage from a trespassing pet. Stuart M. Speiser, Charles F. Krause, Alfred W. Gans, THE AMERICAN LAW OF TORTS (1990) §21.33. In fact, because of the nature of pets such as cats, owners are seldom held liable in negligence. "Cats are generally regarded as domestic animals - pets - and, as a consequence, the subjection to liability of their owners, keepers, possessors or harborers is quite limited." *Id.* at § 21.48. The Restatement explains:

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[3](...continued)
385 S.W.2d at 113; *White v. Smith*, No. E2004-02467-COA-R3-CV, 2005 WL 1183151, * 5-7 (Tenn. Ct. App. May 19, 2005) (discussing authority on the issue in the context of the statute making it unlawful for an owner to allow a dog to go onto a public street or run at large, but concluding it was unnecessary to determine whether a showing of negligence was required since actual negligence was established in that case). That is, the owner may not be liable if the owner has taken reasonable steps to keep the animal confined in view of the language of the statutory duty. There is no question in this case that Ms. Carter made no effort to keep Chester from wandering off her property. She instituted some efforts as to her other cats after Chester's shooting.

[4]At oral argument, in response to our questions, some reference was made to a local "leash law." The record before us does not include a copy of any such ordinance or reference to or explanation thereof. We do not know the scope or requirements of the local ordinance and whether it would apply to the area where the parties live or to animals like cats. Because the ordinance does not appear in the record, we are unable to consider it. Tenn. R. Evid. 202(b).

[5]The other rules applying to possessors of animals deal with wild or dangerous animals or damage caused by a nondangerous domestic animal other than through trespass. *See, e.g.,* Restatement (Second) of Torts § 518.

> There are certain domestic animals so unlikely to do harm if left to themselves and so incapable of constant control if the purpose for which it is proper to keep them is to be satisfied, that they have traditionally been permitted to run at large. This class includes . . . cats.

RESTATEMENT (SECOND) OF TORTS § 518 cmt. *j*.[6] The commentary recognizes that there may be situations where allowing such animals to run at large would involve negligence, and in those situations, liability would be imposed on the same basis as in other negligence cases. In other words, the principles applicable to negligence generally would be applied, including the element of duty of care.

In negligence law, duty is simply a legal obligation owed by a defendant to conform to a reasonable person standard of care for the protection of the plaintiff against unreasonable risks of harm. *Staples*, 15 S.W.3d at 89; *McCall v. Wilder*, 913 S.W.2d 150, 153 (Tenn. 1995). As a general rule, all persons have a duty to use reasonable care under the circumstances to refrain from conduct that will foreseeably cause injury to others. *Biscan*, 160 S.W.3d at 478; *Doe v. Linder Constr. Co., Inc.*, 845 S.W.2d 173, 178 (Tenn. 1992).

Whether or not a duty exists in a particular situation is a question of law. *Biscan*, 160 S.W.3d at 478. Consequently, our review is *de novo*, with no presumption of correctness attached to the trial court's ruling. The test for existence of a duty involves balancing the foreseeability and gravity of potential harm from conduct against the burden to avoid the harm by avoiding that conduct. "A risk is unreasonable and gives rise to a duty to act with due care if the foreseeable probability and gravity of harm posed by defendant's conduct outweigh the burden upon defendant to engage in alternative conduct that would have prevented the harm." *McCall v. Wilder*, 913 S.W.2d 150, 153 (Tenn. 1995).

A number of factors are to be considered in deciding whether a risk is an unreasonable one, thereby giving rise to a duty: (1) the foreseeable probability of the harm or injury occurring; (2) the possible magnitude of the potential harm or injury; (3) the importance or social value of the activity engaged in by defendant; (4) the usefulness of the conduct to defendant; (5) the feasibility or alternative, safer conduct and the relative costs and burdens associated with that conduct; (6) the relative usefulness of the safer conduct; and (7) the relative safety of alternative conduct. *Biscan*, 160 S.W.3d at 479; *McClung v. Delta Square Ltd. P'ship*, 937 S.W.2d 891, 901 (Tenn. 1996); *McCall*, 913 S.W.2d at 153.

The foreseeability of the harm is an important consideration. "Although all the balancing considerations are important, the foreseeability prong in paramount because '[f]oreseeability is the test of negligence.'" *Biscan*, 160 S.W.3d at 480, quoting *Doe*, 845 S.W.2d at 178. In short, a duty

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[6] The commentary also notes that although the owner may allow such an animal to run at large, he or she may still be liable if the owner sees the animal about to do harm to people or property and does not exercise reasonable care to prevent it.

of care is dependent upon foreseeability. *Burroughs v. Magee*, 118 S.W.3d 323, 332 (Tenn. 2003); *Pittman v. Upjohn*, 890 S.W.2d 425, 431 (Tenn. 1994). Harm need only be reasonably foreseeable.

As discussed above, the nature of cats as domestic pets has been viewed as creating little likelihood of person injury to others or substantial damage to the property of others. Consequently, it is not generally foreseeable that a cat will cause damage even if it roams onto another's property. Foreseeability is at the core of another general rule regarding animals: that an owner who has an animal known to be dangerous, vicious, or otherwise prone to cause injury or damage may be liable if that owner does not use reasonable care to prevent such damage or injury. Specifically with regard to cats, one treatise has stated it as follows:

> But the standard exception to the general rule is also well established in cat cases. Liability may well ensue where the possessor of the cat knows or has reason to know of the vicious propensities of the animal to bite, scratch, etc. Failure to control or to restrain the animal may serve as the underpinnings of liability. A person injured by a domestic animal such as a cat may recover from the animal's possessor or keeper for injuries inflicted only by proving (1) that the animal had a vicious propensity, and (2) the cat's keeper had knowledge of such vicious propensity.

Stuart M. Speiser, Charles F. Krause, Alfred W. Gans, THE AMERICAN LAW OF TORTS §21.48 (1990).

The case before us does not involve personal injuries from an attack by the cat, and the knowledge of vicious propensities is irrelevant herein. More relevant is the foreseeability of Chester causing the damage to the truck. Ms. Carter testified that she had never known any of the cats she has had to scratch metal. There is no evidence to the contrary. Further, although Mr. McElroy testified that the Carters knew from the first day they moved in that they should keep their cats off his property, he did not testify that he informed the Carters that Chester or any other cat had damaged his property.

The question before us is whether, under all the circumstances, Ms. Carter had a duty to confine her cats, including Chester, or otherwise prevent them from entering upon Mr. McElroy's land and doing damage thereupon. We conclude that the foreseeability and gravity of harm that a cat would cause substantial property damage or even that it would scratch the paint on a vehicle was minimal. Consequently, Ms. Carter was not under a duty to prevent Chester from leaving her property or entering upon the property of others. Having failed to establish a duty of care, Mr. McElroy did not prove a cause for negligence and was not entitled to damages.

Although our conclusion as to the issue of duty of care renders it unnecessary to discuss the issues raised by Ms. Carter, we will do so since the parties focused their attention on these issues.

IV. AMOUNT OF DAMAGES

As we indicated above, the amount of damages awarded to Mr. McElroy was based on the testimony of Mr. Lee. It was his testimony that the scratches in the truck could not be repaired because of the unique nature of the pearlized color on the truck. Instead, all the paint would have to be removed, with the truck taken down to primer and a complete repainting with expensive, customized paint done. He set the cost of restoration of the truck to its pre-scratch condition at $6,500 including paint and labor.

Ms. Carter challenges Mr. Lee's estimate on the basis he is a longtime friend of Mr. McElroy and, therefore, biased toward his friend in the litigation. She argues that his testimony that the scratches could not be repaired should be discredited. She also argues that his estimate of costs was grossly inflated and should be disregarded.

There is no other evidence in the record to dispute the cost of the repairs. Mr. McElroy testified he had gotten an estimate from Mr. Lee, but that he had not hired him because he could not afford Mr. Lee. The trial court obviously found Mr. Lee a credible witness regarding the type of work needed to restore the truck and the cost of that work. Credibility of witnesses is best determined by the trial court. We find no basis in this record to disregard Mr. Lee's testimony or to fix any other amount for the cost of repair.

V. CAUSATION

Ms. Carter also argues that the trial court erred in finding that Chester caused the damage to the paint job on Mr. McElroy's truck. We note that while Mr. McElroy was insistent that Chester was responsible, the proof was not so conclusive. For example, Ms. Carter testified that some of Mr. McElroy's other neighbors had cats that were allowed to run wild. Mr. McElroy admitted that if Chester could get underneath the cover, other animals could do so as well, so it is possible that some other animals might have caused the damage.

More significant are the deficiencies in the proof actually presented. Mr. McElroy testified that he did not remember when he first discovered the damage to his truck, raising an inference that it was scratched by a creature or creatures unknown prior to the day that he shot Chester. It is unclear from his testimony whether he shot Chester because he was angry about prior intrusions into the vehicle or angry about prior damage to its paint, but it certainly appears that he did not first discover damage on the day he shot Chester.

However, Mr. McElroy testified that Chester scratched the paint with his claws as he exited from the truck. Mr. McElroy's testimony is less than precise as to what he saw, i.e., he did not actually say he saw Chester scratch the paint. Neither was the connection between the location of the scratches and the cat's exit path made clear. His testimony also establishes that some damage was present before the day he shot Chester.

The trial court found that Mr. McElroy had proved by a preponderance of the evidence that "the property damage occurring to his truck was caused by Pamela Carter's cat, 'Chester.'" After reviewing the record, we find that the evidence preponderates against the court's finding that Chester caused the damage for which Mr. McElroy seeks compensation. Tenn. R. App. P. 13(d).

VI.

The trial court's award of damages to John McElroy is reversed. We remand this case to the Circuit Court of Sumner County. Tax the costs on appeal to the appellee, John McElroy

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PATRICIA J. COTTRELL, JUDGE